

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

96

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

486

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,187

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

MAR - 6 1961

Joseph W. Stewart

CLERK

SARAH S. WAGNER,

Appellant,

v.

CHARLES A. WAGNER,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

W. CAMERON BURTON

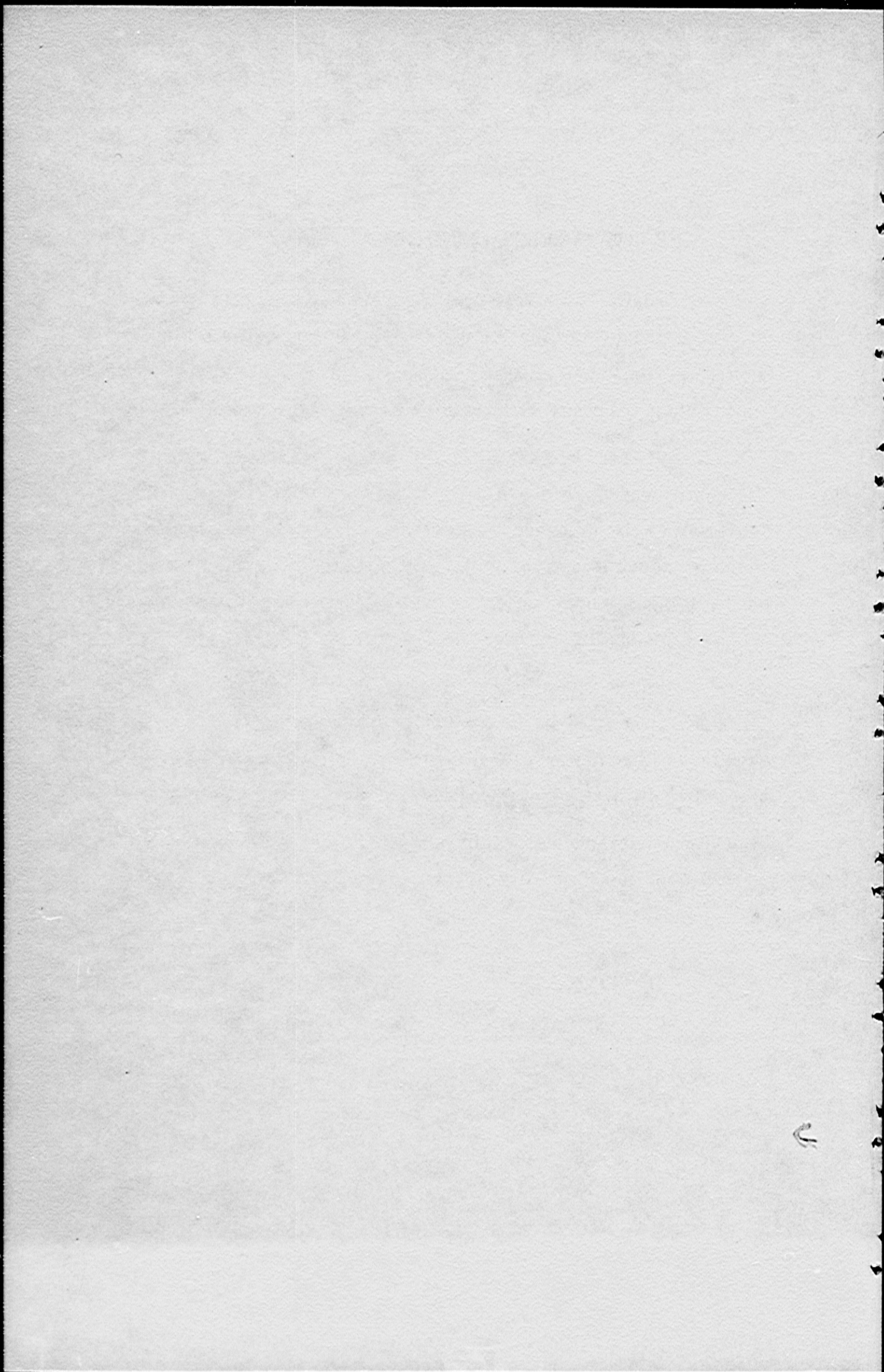
H. GEORGE SCHWEITZER

**Investment Building
Washington 5, D. C.**

Attorneys for Appellant

Of Counsel:

**BURTON, HEFFELFINGER,
McCARTHY & KENDRICK**



(i)

QUESTIONS PRESENTED

The questions presented are:

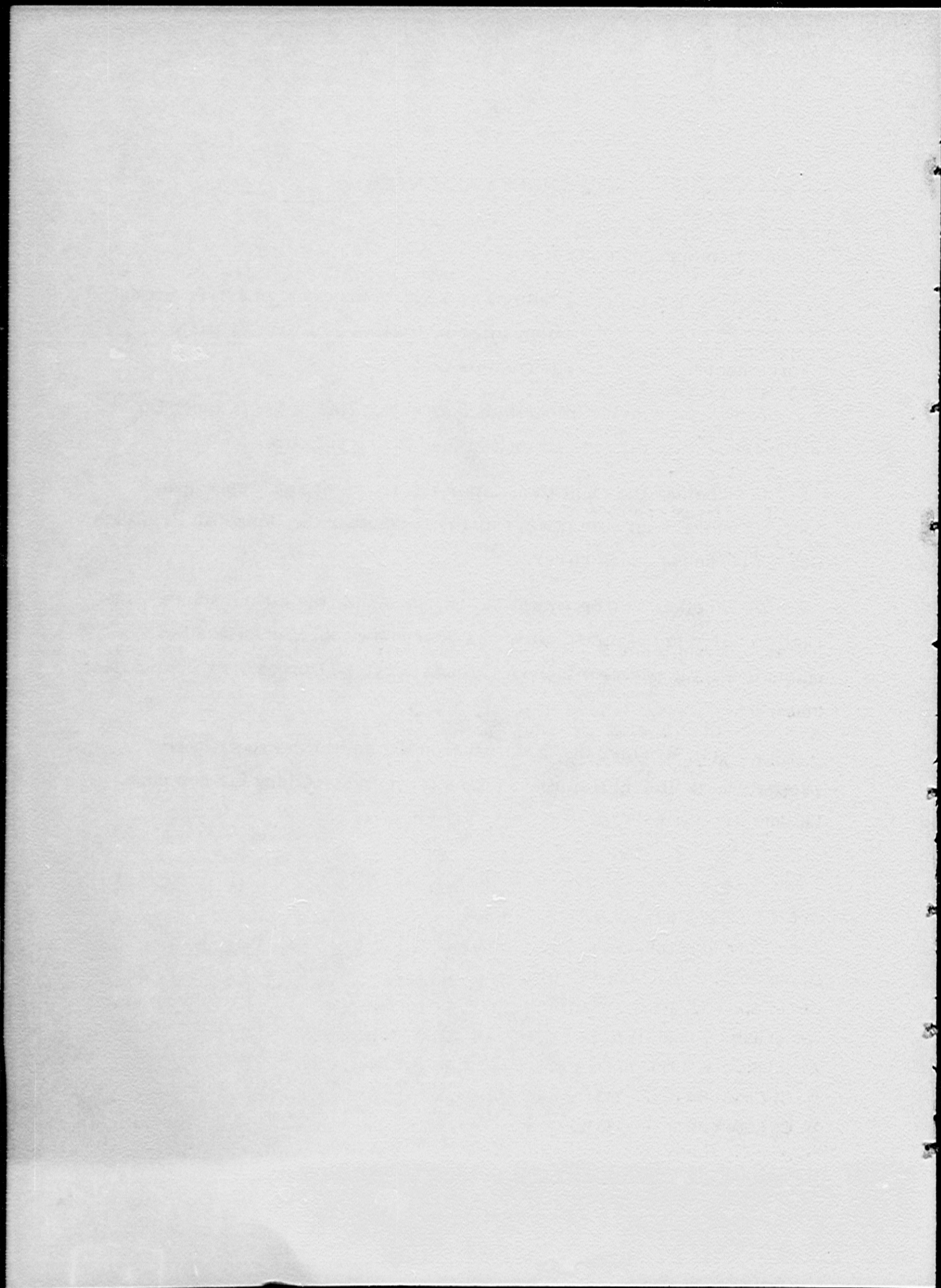
1. Whether a former wife has a right to maintain an action against her former husband for alimony after he obtains a foreign ex parte divorce decree wherein no alimony is granted.

2. Whether jurisdiction of such an action lies in the District Court or the Domestic Relations Branch in the Municipal Court.

3. Whether the right to maintain the action, if any, rests upon a court's general equitable powers and if so whether the Domestic Relations Branch possesses such powers.

4. Whether if alimony can be allowed under the circumstances, the real property in the jurisdiction of a nonresident former husband can be subjected to the payment thereof through service of process by publication; and if so,

(a) Whether the designation in the suit of the specific real property is sufficient to initiate jurisdiction or something further must be done.



(III)
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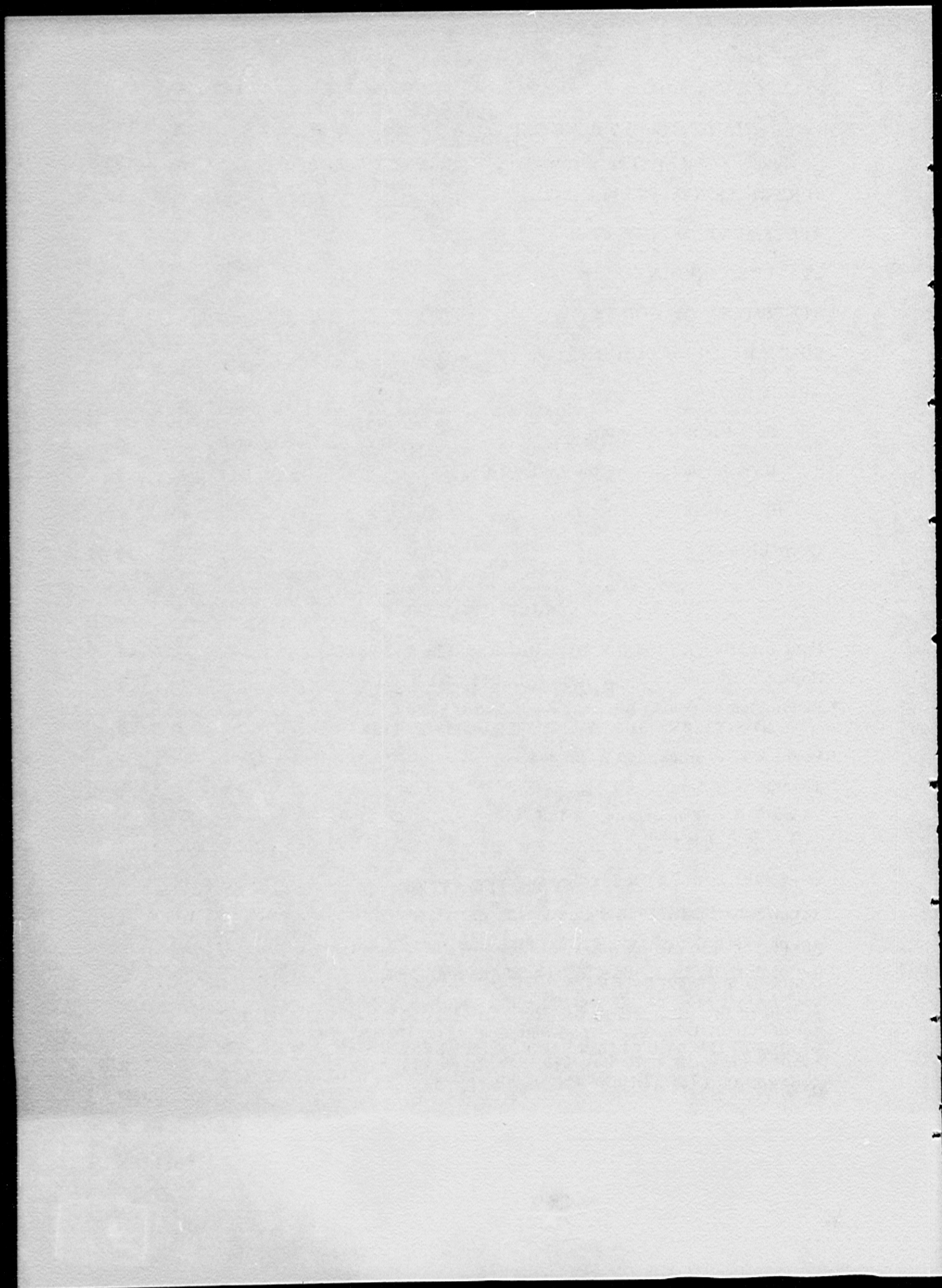
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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 16,187

SARAH S. WAGNER,

Appellant,

v.

CHARLES A. WAGNER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was commenced by the filing of a complaint (J.A. 1) in the lower court by a former wife against her former husband, seeking support and maintenance for herself and additional support and maintenance for her minor son (J.A. 2); for the subjection of the former marital home to such support payments; for the determination of the property rights of the plaintiff in the former marital home (J.A. 3); for the enjoining of the sale of this home (J.A. 3) and the stay of a suit for its possession (J.A. 2); and for other relief.

The jurisdiction of the lower court was based on the Act of February 27, 1877, 19 Stat. 253, ch. 69, Sec. 2; 11-306 D.C. Code (1951).

Appellant contends that the Act of April 11, 1956, 70 Stat. 112, ch. 204, Sec. 105; as amended by the Act of September 9, 1959, 73 Stat. 473, Pub. L. 86-241, Sec. 1; 11-762 D.C. Code (1951), Supp. VIII, does not apply.

The jurisdiction of this court is based on the Act of June 25, 1948; ch. 646, 62 Stat. 929, as amended Oct. 31, 1951, ch. 655, Sec. 48, 65 Stat. 726, and July 7, 1958, Pub. L. 85-508, Sec. 12(e), 72 Stat. 348; U.S.C.A. Title 28, Sec. 1291.

STATEMENT OF THE CASE

Appellant, Sarah S. Wagner, sued her former husband, Charles A. Wagner (J.A. 1), alleging that she has been a bona fide resident of the District of Columbia for more than two years preceding the filing of the complaint, and that the defendant is a resident of Dayton, Ohio; that they were married in the District of Columbia on June 27, 1939, and have two children, Helen Wagner, eighteen years, and Henry Wagner, nine years. Until May 1953 they lived together as man and wife, when the husband left the wife and went to Ohio with the intention of never returning (J.A. 1). He obtained a final decree of divorce on November 26, 1958, in the Common Pleas Court of Montgomery County, Ohio, Division of Domestic Relations, and in that action the court granted the custody of the child Helen Wagner to the husband and the custody of Henry Wagner to the wife, and ordered the husband to pay \$15.00 per week for the support of the son Henry (J.A. 1, 2). Both children are now living with their mother. The husband obtained the decree of divorce in Ohio, ex parte, and no provision was made for alimony to the wife. Appellant was a faithful wife during the marriage and a dutiful mother to her children, but she is unable to support herself and her child and is in debt, and, while the former husband receives a substantial income, he has refused to maintain the wife. Appellant and appellee maintained their marital abode at 3929 Ames Street, Northeast, the title to which is in the former husband although the former wife assisted in the purchase of the property by the payment of

some of the monthly payments on the deferred purchase money trust note. The husband contemplates a sale of the home and instituted an action for possession against the former wife in the landlord and tenant branch of The Municipal Court for the District of Columbia (J.A. 2).

After alleging substantially the above facts the former wife prayed for a judgment requiring the former husband to pay a just and reasonable amount for her support pendente lite and permanently; for a judgment requiring him to pay an additional sum for the support and maintenance of the son Henry pendente lite and permanently; for a stay of The Municipal Court's possessory action (J.A. 2); for an injunction of the sale of premises 3929 Ames Street, Northeast, until the termination of the action; for a determination of the property rights of the former wife in the Ames Street house; for the subjection of that property to any support payments which might be awarded; and for further relief (J.A. 3).

The complaint was served on the defendant on June 2, 1960, at his residence at 517 Grange Hall Road, Dayton, Ohio, by one Richard G. Evans, deputy U. S. marshal for the Southern District of Ohio (J.A. 3). Thereafter the former husband moved to quash the service of process and in his motion states his correct name to be C. Dinsmore Wagner (J.A. 3, 4). This motion was informally granted on July 13, 1960 (J.A. 1) and thereafter a motion for rehearing of the motion to quash was filed (J.A. 4). By an order entered October 14, 1960, the service was quashed and the cause dismissed (J.A. 6) and by an order of October 19, 1960 (J.A. 7) which was corrected by an order of November 25, 1961 (J.A. 8), the motion for rehearing on the motion to quash service was denied and the complaint was dismissed. Appellant filed a notice of appeal from the judgments of October 14 and October 19, 1960 (J.A. 9).

STATUTES INVOLVED

Section 11-762, D.C. Code (1951) provides as follows:

The Domestic Relations Branch and each judge sitting therein shall have exclusive jurisdiction over all actions for divorce from the bond of marriage and legal separation from bed and board, including proceedings incidental to such actions for alimony, pendente lite and permanent, and for support and custody of minor children; applications for revocation of divorce from bed and board; civil actions to enforce support of minor children; civil actions to enforce support of wife; actions seeking custody of minor children; actions to declare marriages void; actions to declare marriages valid; actions for annulments of marriage; determinations and adjudications of property rights, both real and personal, in any action hereinabove referred to in this section, irrespective of any jurisdictional limitation imposed on the Municipal Court for the District of Columbia; and proceedings in adoption.

Nothing in this chapter shall be construed to divest the United States District Court for the District of Columbia of jurisdiction and power to consider, and to enter and enforce judgments, orders, and decrees in any such action, application or proceeding filed in such court prior to the effective date of this section to the same extent as if this chapter had not been enacted.

Section 11-763 (a), D.C. Code (1951) provides as follows:

The Domestic Relations Branch is hereby vested with so much of the power as is now vested in the United States District Court for the District of Columbia, whether in law or in equity, as is necessary to effectuate the purposes of this chapter, including but not limited to, the power to issue restraining orders, injunctions, writs of habeas corpus, and ne exeat, and all other writs, orders, and decrees.

Section 13-108, D.C. Code (1951) provides as follows:

Publication may be substituted for personal service of process upon any defendant who cannot be found and who is shown by affidavit to be a non-resident, or to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons, in suits for partition, divorce, annulment, by attachment, foreclosure or mortgages and deeds of trust, the establishment of title to real estate by possession, the enforcement of mechanics' liens, and all other liens against real or personal property

within the District, and in all actions at law and in equity which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court.

Personal service of process may be made by any person not a party to or otherwise interested in the subject-matter in controversy on a non-resident defendant out of the District of Columbia, which service shall have the same effect and no other as an order of publication duly executed. In such case the return must be made under oath in the District of Columbia, unless the person making the service be a sheriff or deputy sheriff, a marshal or deputy marshal, authorized to serve process where service is made, and such return must show the time and place of such service and that the defendant so served is a non-resident of the District of Columbia. The cost and expense of such service of process out of the District of Columbia shall be borne by the party at whose instance the same is made and shall not be taxed as a part of the costs in the case; but where such service of process is made by same authorized officer of the law in this section mentioned, the actual and usual cost of such service of process shall be taxed as a part of the costs in the case.

STATEMENT OF POINTS

The lower court erred in quashing the service of process and dismissing the complaint.

SUMMARY OF ARGUMENT

1. The former wife, complainant below, had a right to maintain an action against her former husband for alimony or support, notwithstanding a foreign ex parte divorce decree obtained by him wherein no allowance of alimony was made.

2. Jurisdiction of this suit lies in the District Court instead of the Municipal Court (Domestic Relations Branch) because of the limited jurisdiction of the latter which does not authorize suits by former wives which the complainant has now become as a result of the divorce decree which must be accorded full faith and credit as to status.

3. This Court holds that the right of the former wife rests upon the court's general equitable power to award support money but the Domestic Relations Branch has no such power.

4. The right of the former wife to support can be enforced against property in the District of Columbia of the non-resident former husband who is not served personally with process.

5. The issuance of an injunction against the specific real property described in the complaint would give the Court jurisdiction to proceed against the defendant by publication and the mere filing of suit should do so since it asserts an immediate object to enforce a lawful right, claim or demand against specific real property within the jurisdiction of the court within the meaning of Sec. 13-108, D. C. Code (1951) authorizing service by publication.

ARGUMENT

I

RIGHT TO MAINTAIN ACTION

The main purpose of the complaint filed by the appellant below was to compel her former husband to pay her maintenance, pendente lite and permanently, notwithstanding the ex parte divorce obtained by him in Ohio wherein no provision was made for alimony. The other prayers for judgment, with one exception, are incidental thereto. They are: to stay a possessory action to eject appellant from the marital home to which appellee holds title; to stay a sale of that property; to determine the appellant's property rights in the marital home; to subject that property to support payments to appellant and for general relief. The other prayer was for a judgment requiring the appellee to pay an additional sum for the support of the infant son of the parties.

Since the divorce obtained in Ohio by the husband was an ex parte one, there cannot be much question that the wife's right to alimony was not cut off because of no award of alimony made therein. Hopson v. Hopson (Jan. 20, 1955), 95 U.S. App. D.C. 285, 221 F. 2d 839; Vanderbilt v. Vanderbilt (June 24, 1957), 354 U.S. 416, 1 L.Ed. 2d 1456, 77 S. Ct. 1360. This Court held in Hopson as the Supreme Court later did in Vanderbilt that in an ex parte divorce in favor of the husband only the status of the parties is determined and not the right of the wife to support. And this Court also held in Hopson that the right to award support to a wife existed apart from statute under the lower court's general equitable powers.

II

JURISDICTION OF THE DISTRICT COURT

By reason of the foregoing, the lower court had jurisdiction of the subject matter of the complaint unless that jurisdiction has been committed by Congress exclusively to the Domestic Relations Branch in the Municipal Court for the District of Columbia.

Unfortunately, the Domestic Relations Branch has only so much jurisdiction as specifically given it by statute. It has no general equitable jurisdiction. Posnick v. Posnick (D. C. Mun. App.), 160 A. 2d 804, 806.

Its power, whether legal or equitable, is only so much as was previously vested in the United States District Court in order to effectuate the purposes of the act creating it. Sec. 11-763, D.C. Code (1951). The various types of actions over which it has jurisdiction are set out in Sec. 11-762, D. C. Code (1951). None of them encompass a suit by a former wife. The nearest approach in categories is this one: "... civil actions to enforce support of wife". The complainant here is not a wife.

Hopson and Vanderbilt both recognize that an ex parte divorce may be effective so far as marital status is concerned and is entitled to "full faith and credit" if the court had jurisdiction of the plaintiff. It follows

that upon the granting of a valid ex parte divorce to a husband, the wife has lost her status as such and she comes in as a former wife to enforce the right of support not cut off by the decree. But being a former wife she cannot bring herself within either the express or the implied terms of the Domestic Relations Branch jurisdiction and must seek the aid of the general equitable powers of the district court.

If the Domestic Relations Branch has exclusive jurisdiction then she is remediless because Hopson holds that statutory authorization for a maintenance decree is not a limitation on the court's general equitable powers to enter such a decree (95 U.S. App. D.C. 290, 221 F. 2d 845), and states at 95 U.S. App. D.C. 292, 221 F. 2d 847:

→ "We therefore modify the rule announced in Meredith by recognizing that, guided by the sort of equitable considerations we have described, District of Columbia courts, consistently with local policy, may allow maintenance after an ex parte foreign divorce under their general equity power."

Without general equity power the Domestic Relations Branch can thus afford a former wife no relief.

It is conceded that the district court has no power to award maintenance for a minor son but this does not vitiate the balance of the complaint.

III

SERVICE OF PROCESS

The complaint in this case was served on the defendant (appellee) by a Deputy U. S. Marshal at the former's residence at 517 Grange Hall Road, Dayton, Ohio (J.A. 3). The service was made under the provisions of Sec. 13-108, D. C. Code (1951), permitting publication to be substituted for personal service of process and permitting personal service of process out of the District of Columbia on a nonresident to take the place of publication.

That section permits publication against a nonresident:

" . . . in all actions * * * which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court."

presumably with or without attachment

The complaint sought to establish a claim or a demand against property within the jurisdiction of the court, namely, the former marital home. The jurisdiction of the District of Columbia extends to property within its limits and it can subject property owned by nonresidents to the demands of its citizens. Pennington v. Fourth Nat. Bank, 243 U.S. 269, 37 S. Ct. 282, 61 L. Ed. 713, LRA 1917 F. 1159; Thompson v. Tanner, 53 App. D.C. 3, 287 Fed. 980.

Both Pennington and Thompson stand for the proposition that alimony or support may be paid out of property in the jurisdiction belonging to a defendant who is not personally served with process. In Pennington the defendant was a nonresident husband and in Thompson he was an absconding husband.

In aid of her effort to subject appellee's property to the payment of any judgment for support appellant sought an injunction to prevent its sale and an injunction against the prosecution of a landlord and tenant proceeding brought to oust her from possession. The issuance of the injunction against sale would have been an effective seizure of the property. In Pennington, where payment out of a bank account of defendant was enjoined, the Court said (243 U.S. 272, 61 L. Ed. 715):

"The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process."

Query, then, whether the mere filing of suit with a designation of the precise premises to be subjected to attack was not sufficient to give

the court jurisdiction over the res. In the conventional quiet title suit with which all of us are familiar, there is no seizing of the realty by injunction or otherwise, yet no question is raised as to the jurisdiction of the court over nonresident defendants. The filing of suit there as here operates as a *lis pendens* and thereby gives notice to all.

It would seem that due process is accorded the defendant in a far greater degree if he has notice and an opportunity to appear before something is done to his property rather than after.

CONCLUSION

The complaint in this case ought not to have been dismissed. The former wife has an unquestioned right to have her claim for alimony heard and if granted to have it satisfied out of the former husband's property within the jurisdiction. It would seem that only the District Court has jurisdiction of her claim, but, if not, the cause of action should be certified to the Domestic Relations Branch in the Municipal Court. This was done in Harris v. Harris, 106 U.S. App. D.C. 283, 272 F. 2d 511.

Respectfully submitted,

W. CAMERON BURTON

Investment Building
Washington 5, D. C.

Attorney for Appellant

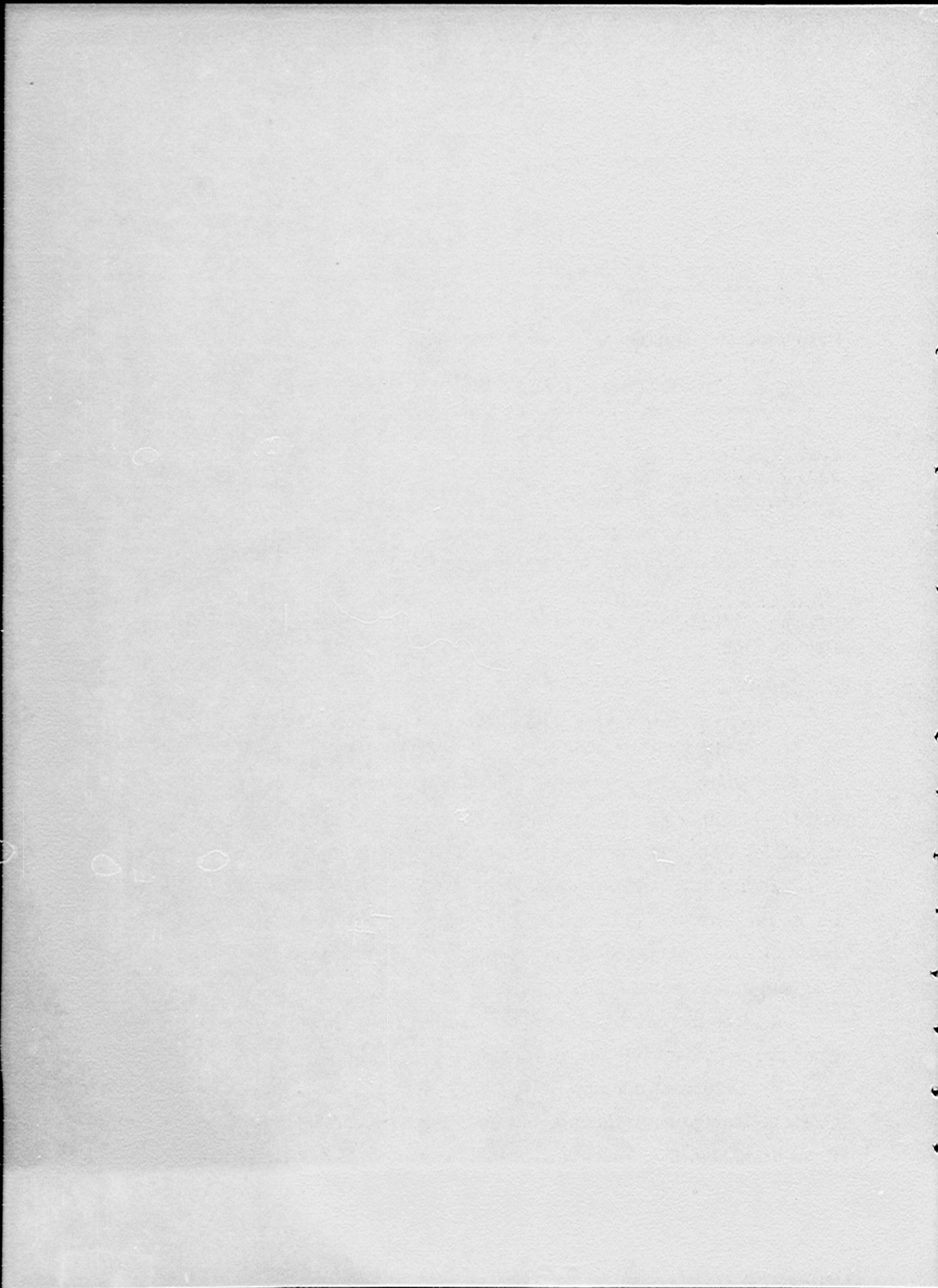
Of Counsel:

BURTON, HEFFELFINGER,
McCARTHY & KENDRICK

(1)

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JOINT APPENDIX

[Filed April 7, 1960]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIASARAH S. WAGNER
3929 Ames Street, N. E.
Washington 19, D. C.,

Plaintiff

v.

CHARLES A. WAGNER
517 George Hall Road
Dayton, Ohio,

Defendant

Civil Action No. 1054-60

*I Dismissed
no jurisdiction
II Also dismissed
7/13/60*COMPLAINT FOR MAINTENANCE, INJUNCTION AND
DETERMINATION OF PROPERTY RIGHTS

1. Plaintiff is a bona fide resident of the District of Columbia and has been such for more than two years preceding the filing of this complaint. The defendant is a resident of Dayton, Ohio.

2. Plaintiff and defendant were married in the District of Columbia on the 17th day of June, 1939. There were two children, born as the issue of said marriage, namely Helen Wagner, age 18 years and Henry Wagner, age 9 years.

3. The parties lived together as man and wife until May, 1953 when the defendant left the plaintiff and went to Ohio.

4. Defendant sued plaintiff for a divorce in the Common Pleas Court of Montgomery County, Ohio, Division of Domestic Relations, Case No. 77776 D.R. and obtained a final decree of divorce on or about the 26th day of November, 1958. The Court, in the aforesaid action,

granted Charles D. Wagner the custody of Helen Wagner and granted Sarah S. Wagner the custody of Henry Wagner and further ordered Charles D. Wagner to pay the sum of \$15.00 per week for the support of the minor child, Henry Wagner, said payments to be made through the Montgomery County Humane Society, Dayton, Ohio. Both Helen and Henry Wagner are now living with their mother, the plaintiff.

X 5. The defendant, Charles D. Wagner, obtained the aforesaid divorce in Ohio ex parte and no provision was made for any alimony on behalf of the wife.

6. Plaintiff during her marriage was a faithful wife to the defendant and a dutiful mother to her children but is unable to support herself and her child and is in debt.

7. Defendant is employed and receives a substantial income but, although able to maintain his wife, has refused to do so.

X 8. Prior to the Ohio divorce, the parties maintained their marital abode at 3929 Ames Street, N.E., which home is shown on the land records of the District of Columbia to be owned by the defendant.

X 9. The plaintiff assisted in the purchase of said property by the payment of some of the monthly payments on the deferred purchase money trust note.

10. The plaintiff is informed and believes that the defendant contemplates a sale of said home in the near future and has instituted an action for possession against the plaintiff in the Landlord and Tenant Branch of the Municipal Court for the District of Columbia, Case No. L & T 64889-59.

WHEREFORE, plaintiff prays,

1. For judgment requiring the defendant, Charles D. Wagner, to pay such amount as seems just and reasonable for her support, pendente lite and permanently.

2. For judgment requiring the husband to pay an additional sum to the plaintiff for the support and maintenance of Henry Wagner; pendente lite and permanently.

3. That this Court stay the Municipal Court action for possession until termination of this action.

4. That this Court enjoin the sale of premises 3929 Ames Street, N.E. by the defendant until termination of this action.

5. That this Court determine the property rights of the plaintiff in and to 3929 Ames Street, N.E., Washington, D.C.

6. That the Court subject said property to any support payments which may be awarded herein.

7. For such other and further relief as the Court may seen just and proper.

/s/ Sarah S. Wagner

BURTON, HEFFELFINGER, McCARTHY & KENDRICK

By: /s/ W. Cameron Burton
Attorneys for Plaintiff
1005 Investment Building
Washington 5, D. C.

[Verification and Jurat dated April 2, 1960]

[Filed June 22, 1960]

MOTION TO QUASH SERVICE OF PROCESS

The defendant C. Dinsmore (erroneously named Charles A. Wagner in the Complaint), by his attorneys the undersigned, enters his special appearance in the above-captioned cause for the sole purpose of contesting the sufficiency of service of process upon him, and hereby moves the Court to set aside the purported service of process upon him as indicated in the return by the Deputy U. S. Marshal for the Southern District of Ohio, Richard G. Evans, whose purported service upon the defendant took place on June 2, 1960 at 6:30 p.m. at the residence of the said C. Dinsmore Wagner at 517 Grange Hall Road, Dayton, Ohio. As grounds for this Motion the defendant avers:

1. That the face of the Complaint itself and the return of the said Deputy Marshal, indicate that the defendant is a non-resident of the District of Columbia and a resident of the State of Ohio.

2. That this action being in essence a suit for maintenance and

injunction, is an in personam action and there is no authority under the laws of the District of Columbia for personal service upon the defendant by delivery of a copy of the Summons and Complaint outside of the jurisdiction of the District of Columbia.

3. That the purported service of process in this case as indicated on the face of the Complaint indicate that it was made by delivery of a copy of the Summons to the defendant at his place of residence in Ohio outside of the jurisdiction of the District of Columbia.

In support of this Motion the defendant attaches a Memorandum of Points and Authorities.

FROST & TOWERS

By: /s/ John J. Pyne
605 Southern Building
Washington 5, D. C.
Attorney for Defendant

[Certificate of Mailing]

[Filed July 18, 1960]

**MOTION OF PLAINTIFF FOR REHEARING ON DEFENDANT'S
MOTION TO QUASH SERVICE OF PROCESS**

Comes now the plaintiff, Sarah S. Wagner, by and through her attorneys, Burton, Heffelfinger, McCarthy & Kendrick, and moves this honorable Court for a rehearing of Defendant's Motion to Quash Service of Process and also for a hearing on the ruling which she is advised was entered on July 13, 1960, as follows:

"1. Dismissed. No jurisdiction.

2. Also, service bad."

As grounds for this motion the plaintiff states that at the hearing of defendant's Motion the Court ruled that this case was going to be transferred to the Municipal Court.

It is submitted that substituted service was effective in this case in accordance with Section 13-108 of the Code of the District of Columbia.

"Publication may be substituted for personal service of process upon any defendant who cannot be found and who is shown by affidavit to be a nonresident, or to have been absent from the District ^[least (sic)] for at least six months, or against the unknown heirs or devisees of deceased persons, in suits for partition, divorce annulment, by attachment, foreclosure or mortgages and deeds of trust, the establishment of title to real estate by possession, the enforcement of mechanics's liens, and all other liens against real or personal property within the District, and in all actions at law and in equity which have for their immediate object the enforcement of establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the Court."

(Underlinings supplied)

It is further submitted this Court has jurisdiction over the subject matter, the real property being within the jurisdiction of this Court and the plaintiff in her complaint requested, inter alia, that this Court invoke its broad, general equitable powers. At the hearing of the Motion to Quash the Court pointed out that this was a case which should have been brought in the Domestic Relations Court of the Municipal Court of the District of Columbia. It is submitted that in this case brought by an ex-wife against her ex-husband the plaintiff also requests that the Court subject certain real property in the District of Columbia for the payment of alimony to her and support of her minor children and for other relief including the request that this Court enjoin the sale of premises 3929 Ames Street, N.E. The fact that a suit for an injunction requires personal service and that the Defendant is not within the District of Columbia should not be the basis of the dismissal since the party could return to this jurisdiction. See *Dunn vs. Parker*, 8 F.R.D. 373, where the Court at Page 374 stated:

"However, the complaint is not predicated solely on the establishment of a lien, but seeks an injunction and specific performance against defendant Parker personally; and, if he should be personally served, this Court would have jurisdiction to give appropriate

relief. The fact that he has not been served personally since the action was filed on March 4, 1943, is not conclusive that he will not be served personally in the future, and therefore the Motion to Dismiss the action should not be granted as to defendant Parker."

BURTON, HEFFELFINGER,
McCARTHY & KENDRICK

By: /s/ H. George Schweitzer
Attorney for Plaintiff

* * *

[Certificate of Service]

[Filed October 14, 1960]

ORDER

The above cause having come on for hearing on the 11th day of July, 1960, upon the motion of the defendant to quash service of process, and it appearing to the Court that the purported service of process upon the defendant in the State of Ohio was ineffectual under applicable laws, and it further appearing to the Court, upon its own motion, that the subject matter of the above-captioned cause is not within the jurisdiction of this Court, it is by the Court this 14 day of July, 1960,

ORDERED, that the service of process upon the defendant on the 2nd day of June, 1960, be and the same is hereby set aside and quashed, and,

FURTHER ORDERED, that the above-captioned cause be and the same is hereby dismissed for want of jurisdiction in this Court over the subject matter thereof.

/s/ Matthew F. McGuire
JUDGE

[Certificate of Mailing]

[Filed October 19, 1960]

ORDER

The defendant having moved the Court for a rehearing on defendant's Motion to Quash Service in the above-captioned cause, and the plaintiff having filed an opposition thereto, and it appearing to the Court that no grounds have been presented by the defendant for a rehearing of said Motion, it is by the Court this 19th day of October, 1960,

ORDERED that the Motion of defendant for rehearing of defendant's Motion to Quash Service be and the same is hereby denied.

/s/ Matthew F. McGuire
JUDGE

[Certificate of Mailing]

[Filed November 14, 1960]

NOTICE OF APPEAL

Notice is hereby given this 14th day of November, 1960, that plaintiff, Sarah S. Wagner, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgments of this Court entered on the 14th and 19th day of October, 1960 in favor of defendant, Charles A. Wagner against said plaintiff.

Burton, Heffelfinger, McCarthy &
Kendrick

By: /s/ H. George Schweitzer
Attorney for Plaintiff

[Filed November 23, 1960]

**MOTION TO CORRECT ORDER PURSUANT
TO RULE 60**

The defendant, Charles A. Wagner, by his attorneys the undersigned, moves the Court, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to correct its Order signed the 17th day of October,

1960, in the above captioned cause so as to correct certain clerical errors in said Order, namely, the erroneous reference to the plaintiff and defendant as follows:

- a. In line 1 of the Order the word "defendant" should read "plaintiff".
- b. In line 3 the word "plaintiff" should read "defendant".
- c. In line 4 the word "defendant" should read "plaintiff".
- d. In line 7 the word "defendant" should read "plaintiff".

FROST & TOWERS

By: /s/ John J. Pyne

* * *

Attorney for Defendant

[Certificate of Mailing]

[Filed November 25, 1960]

ORDER

The defendant having moved the Court to correct certain clerical errors pursuant to Rule 60 of the Federal Rules of Civil Procedure in the Court's order of the 19th day of October, 1960, it is by the Court this 25th day of November, 1960,

ORDERED that the Order of the Court on the 19th day of October, 1960, in the above-captioned cause be and the same is hereby corrected to read as follows:

"The plaintiff having moved the Court for a rehearing on defendant's Motion to Quash Service in the above-captioned cause, and the defendant having filed an opposition thereto, and it appearing to the Court that no grounds have been presented by the plaintiff for a rehearing of said Motion, it is by the Court this 17th day of October, 1960,

ORDERED that the Motion of plaintiff for rehearing of defendant's Motion to Quash Service be and the same is hereby denied."

/s/ Charles F. McLaughlin
JUDGE

[Certificate of Mailing]

Consent:

H. George Schweitzer
Attorney for Plaintiff

[Filed December 16, 1960]

ORDER

In consideration of the Motion made on behalf of the plaintiff to extend the time within which to file the record on appeal herein, it is by the Court this 16th day of December, 1960,

ORDERED, DECREED AND ADJUDGED that the time for filing the Record on Appeal herein is hereby extended to and including February 1, 1961.

/s/ Charles F. McLaughlin
JUDGE

No Objection

/s/ John J. Pyne
Attorney for Defendant

96
United States Court of Appeals
For the
District of Columbia Circuit

FILED

MAR 24 1961

Joseph W. Stewart

CLERK

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,187

SARAH S. WAGNER,

Appellant,

v.

CHARLES A. WAGNER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

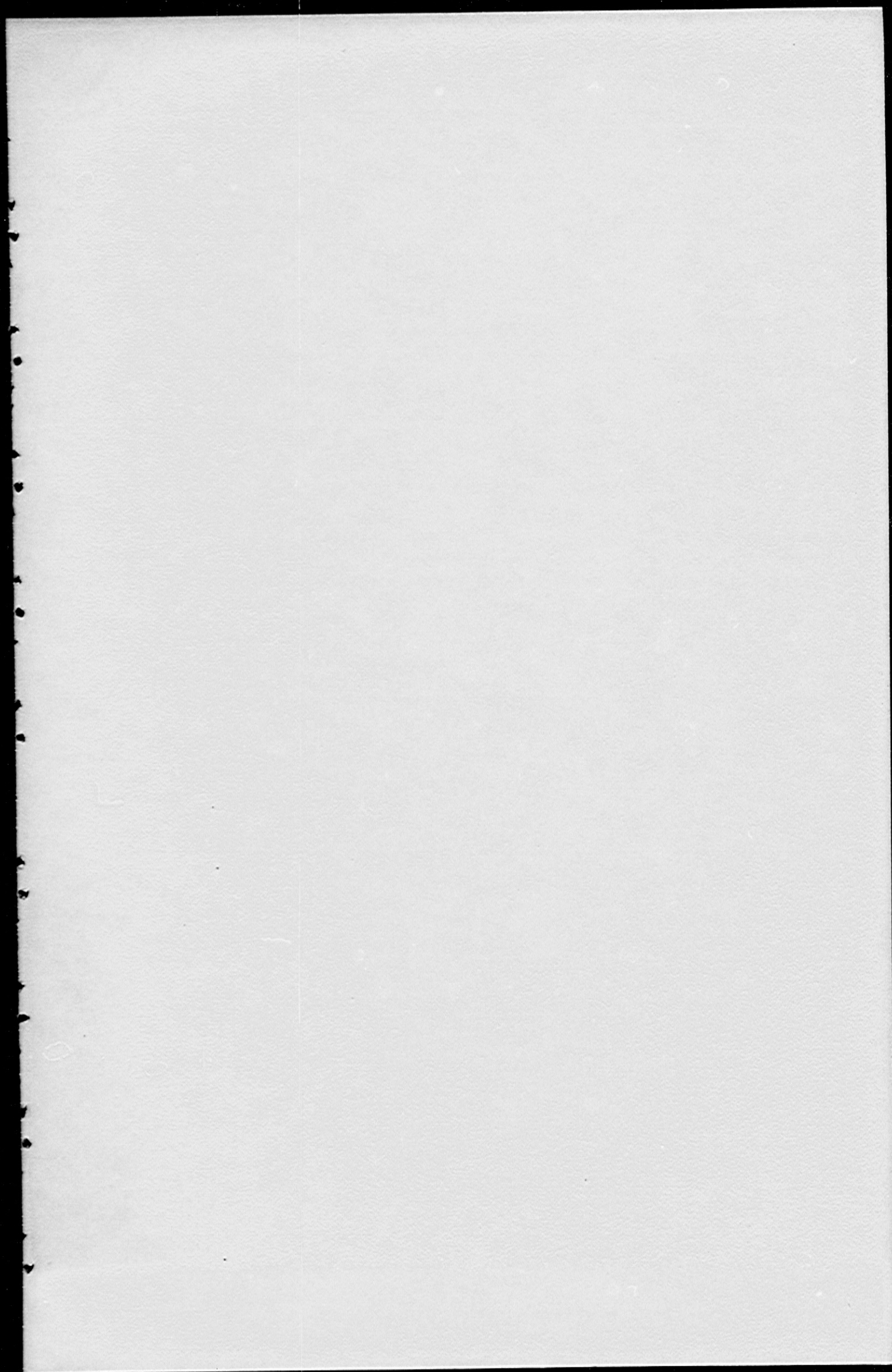
JOHN J. PYNE *on*

605 Southern Building
Washington 5, D. C.

Attorney for Appellee

Of Counsel:

FROST & TOWERS

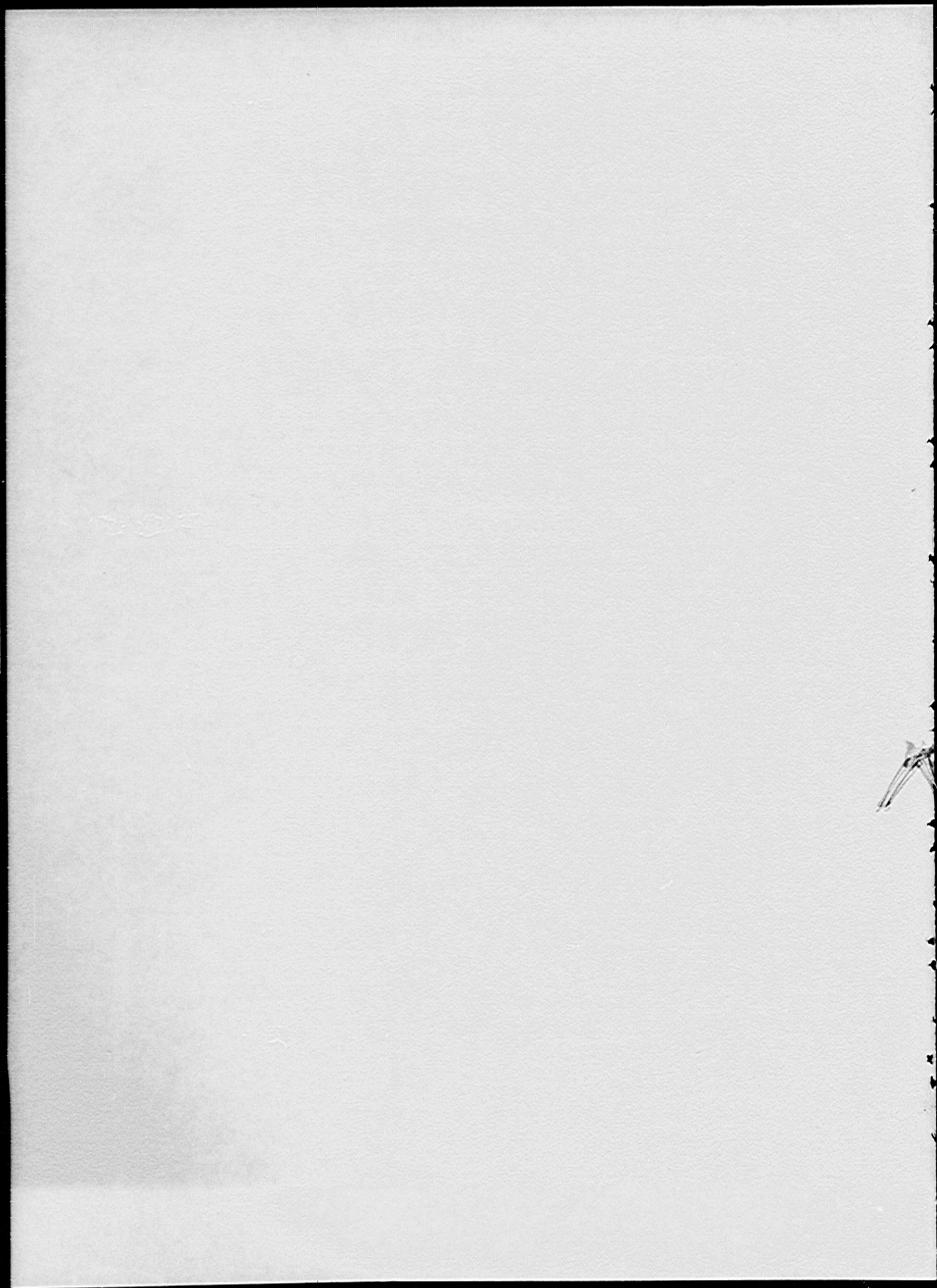


(i)

QUESTIONS PRESENTED

In the opinion of the Appellee, the questions are:

1. Whether the District Court has jurisdiction over an action by a former wife against her former husband for support after he obtains a foreign ex parte divorce decree wherein no alimony is granted.
2. Whether, if the District Court has jurisdiction over the subject matter of such an action, extraterritorial personal service of process upon the non-resident former husband pursuant to Sec. 13-108 of the District of Columbia Code can, without anything further, gives the District Court jurisdiction over real property of the former husband within the jurisdiction so as to subject the property to the payment of such support.



(iii)

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,187

SARAH S. WAGNER,
Appellant,

v.

CHARLES A. WAGNER,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee adopts appellant's statement of the case.

STATUTES INVOLVED

In addition to the statutes listed at page 4 of appellant's brief, the following statutes are involved:

Section 11-756 (a), D. C. Code (1951) which provides as follows:

(a) If, in any action, other than an action for equitable relief, pending on the effective date of this section or thereafter commenced in the United States District Court for the District of Columbia, it shall appear to the satisfaction of the court at any time prior to trial thereof that the action will not justify a judgment in excess of \$3,000, the court may certify such action to the municipal court for the District of Columbia for trial. The pleadings in such action, together with a copy of the docket entries and of any orders theretofore entered therein, shall be sent to the clerk of the said Municipal Court, together with the deposit for costs, and the case shall be called for trial in that court promptly thereafter; and shall thereafter be treated as though it had been filed originally in the said Municipal Court, except that the jurisdiction of that court shall extend to the amount claimed in such action, even though it exceed the sum of \$3,000.

Section 16-301, D. C. Code (1951) which provides as follows:

"In any action at law in the District Court of the United States for the District of Columbia or the Municipal Court of said District, for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied, if the plaintiff, his agent or attorney, either at the commencement of the action or pending the same, shall file an affidavit showing the grounds of his claim and setting forth that the plaintiff has a just right to recover what is claimed in his declaration, and where the action is to recover specific personal property stating the nature and, according to affiant's belief, the value of said property and the probable amount of damages to which the plaintiff is entitled for the detention thereof, and where the action is to recover a debt stating the amount thereof, and where the action is to recover damages for the breach of a contract setting out, specifically and in detail, the breach complained of and the actual damage resulting therefrom, and also stating either, first, that the defendant is a foreign corporation or is not a resident of the District, or has been absent therefrom for at least six months; or, second, that the defendant evades the service of ordinary process by concealing himself or temporarily withdrawing himself from the District; or, third, that he has removed or is about to remove some or all of his property from the District, so as to defeat just demands against him; or, fourth, that he has assigned, conveyed,

disposed of, or secreted, or is about to assign, convey, dispose of, or secrete his property with intent to hinder, delay, or defraud his creditors; or, fifth, that the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought, the clerk shall issue a writ of attachment and garnishment, to be levied upon so much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff: Provided, That the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment."

SUMMARY OF ARGUMENT

A. The District Court judge correctly dismissed the complaint for want of jurisdiction over the subject matter thereof because:

(1) The Domestic Relations Branch of the Municipal Court has exclusive jurisdiction implied by statute over suits for support by anyone — whether wife or former wife — claiming a right to support based upon an unextinguished marital duty of the defendant to furnish same;

(2) A claim for support and maintenance of a minor child is expressly within the exclusive jurisdiction of the Domestic Relations Branch of the Municipal Court;

(3) The Domestic Relations Branch has exclusive jurisdiction over the determination of property rights between spouses or former spouses in any action, such as one for support of wife, of which that branch has exclusive jurisdiction; and

(4) The remaining prayers for relief, namely, for a stay of the possessory action in Municipal Court, for an injunction of the sale of the premises until termination of

the action; for the subjection of the premises to any support payments that may be awarded; and for further relief as may seem just and proper are all prayers for relief which is in aid of or ancillary to the principal relief sought. Since the Court had no jurisdiction to grant the principal relief sought, it lacks jurisdiction to grant the ancillary relief.

B. The District Court judge correctly quashed service of process because the appellant's cause of action amounted to a proceeding in personam and not in rem. Section 13-108 of the D. C. Code, 1951 Edition which provides for substituted service outside the District of Columbia applies only to in rem actions and not to those in personam. Assuming, for the sake of argument, jurisdiction of the lower court over the subject matter of appellant's action, appellant could have obtained service of process by attachment before judgment by compliance with Section 16-301 of the D. C. Code.

C. In the event it is concluded by this Court that the District Court had no jurisdiction over the subject matter of this action, this Court should merely affirm the judgment and not remand the case to the District Court to be certified to the Municipal Court, as suggested by appellant, because there is no statutory authority for such a certification.

ARGUMENT

A. THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION.

1. Action for Support for Appellant.

The Statute creating the Domestic Relations Branch of the Municipal Court for the District of Columbia as amended to date grants exclusive jurisdiction to that branch of the Municipal Court over "civil actions to enforce support of wife." Act of April 11, 1956, 70 Stat. 112, Ch. 204, Sec. 105; as amended by the Act of September 9, 1959, 73 Stat. 473, P.L. 86-241, Sec. 1; 11-762 D. C. Code (1951), Supp. VIII. It gives this

exclusive jurisdiction to that court along with other enumerated types of actions which fall within the common understanding of the term "domestic relations matters." Appellee contends it was the intent of the Congress in establishing the Domestic Relations Branch to transfer jurisdiction over domestic relations matters from the District Court to the Municipal Court. This would include the instant action.

The legislative history supports our contention. The report of the Senate Committee on the District of Columbia (S. Rep. No. 384, 84th Cong., 1st Sess. (1955)) accompanying S. 1289 (enacted as Chapter 204 of Public Law 4861, 70 Stat. 111, D. C. Code (1951) Sections 11-758 et seq.) states at page 3 thereof:

"The purpose of this bill is to establish a Domestic Relations Branch in the Municipal Court for the District of Columbia. Jurisdiction in domestic relations matters such as divorce, separation, alimony, maintenance, custody of children, adoption proceedings and annulments of marriage, would be transferred to the Municipal Court from the United States District Court for the District of Columbia."

The House of Representatives Report No. 1302, 84th Congress, 1st Session, p. 3, (1955) contains almost identical language.

The House Report also states that establishing the Domestic Relations Branch would abolish the rotation of judges hearing domestic relations cases, give jurisdiction to a specialized court and to relieve the District Court of its mounting caseload. At page 3 of the House Report in discussing the advantages of the bill it is stated:

"By its terms, the bill would, for practical purposes, abolish the rotation of judges assigned to hear the types of cases affected by the bill and will thereby effect substantial savings in manpower on the Court. By creating a specialized division in an existing Court, the bill would permit economies, both financial and personnel, which would not be possible if an entirely new Court were created.

The bill would relieve the United States District Court for the District of Columbia of approximately 15 per cent of its numerical caseload and approximately 15 per cent of the trial time devoted to the trial of civil cases. This saving will afford the United States District Court for the District of Columbia some relief in meeting an ever-mounting caseload."

It is conceded by appellee that the language of the statute "civil actions to enforce support of wife", if interpreted strictly, could mean an action for support by a wife who is still married to the defendant when the action is brought. Appellee contends, however, that the legislative history cited above makes such an interpretation a frustration of the legislative intent to transfer "domestic relations matters" from the District Court to the Domestic Relations Branch. Congress indicated its intent to place "domestic relations matters" in a specialized Court to avoid the rotation of judges assigned to hear cases of this type. It indicated its intent also to decrease the District Court caseload and permit economies, both financial and personnel. An action for support based upon the marital duty to support is certainly a domestic relations matter.

We contend that the words of the statute "civil actions to enforce support of wife" should be construed liberally in accordance with the legislative intent. This Court in Hopson v. Hopson, 95 U. S. App. D. C. 285, 221 F. 2d 839, and the Supreme Court in Vanderbilt v. Vanderbilt, 354 U. S. 416, 1 L. Ed. 2d 1456, 775 S. Ct. 1360, have applied the doctrine of the divisibility of divorce so as to hold there are personal rights of a wife acquired through marriage which may survive an ex parte foreign decree, and the right to support or maintenance is one of them. Therefore, it would seem a reasonable interpretation of the words "civil action to enforce support of wife" to include an action for support by one who is still a wife for purposes of support although other rights may have been extinguished by an ex parte foreign decree. In other words, the term "wife" should be interpreted as including anyone who is still — at least theoretically and subject to equitable defenses — a wife for purposes of support.

Finally, since cases of this type will usually arise as this one has, namely, with a claim for support of the ex-wife alongside a claim for support of a minor child, a multiplicity of actions would result from a strict interpretation of the statute. This is because the claim for support of the child is explicitly within the sole jurisdiction of the Domestic Relations Branch as set out hereafter. Such a multiplicity of actions, in itself, would appear to frustrate Congressional intent.

2. Action for Support for Minor Child.

The Domestic Relations Branch of the Municipal Court is given specific exclusive jurisdiction over "civil actions to enforce support of minor children." Sec. 11-762, D. C. Code (1951). Therefore, appellant's action for support of the minor child, Henry Wagner, was properly dismissed for want of jurisdiction. Appellant concedes this at page 8 of her brief.

3. Action to Determine Appellant's Property Rights in Appellee's Real Estate.

The Domestic Relations Branch of the Municipal Court has been given exclusive jurisdiction over "determinations and adjudications of property rights, both real and personal" in any action properly before it including "civil actions to enforce support of wife." Sec. 11-762, D. C. Code (1951). Therefore, if the Domestic Relations Branch has exclusive jurisdiction over the principal action, namely that for support as contended by appellee in No. 1 above, then the Domestic Relations Branch must also have exclusive jurisdiction to determine appellant's property right, if any, in appellee's real estate within the jurisdiction. This should be true even though the claim of appellant to the property may not flow from the marriage itself. In Posnick v. Posnick, Mun. App. D. C., 160 A. 2d 804, the Municipal Court of Appeals, in holding that the Domestic Relations Branch had exclusive jurisdiction of a wife's claim in a divorce action to personal property held by her husband, but unrelated to the marriage, stated at page 807 of its opinion:

"We are inclined to the view, and so hold, that the language of the amendment is so broad that in a divorce action the Domestic Relations Branch has jurisdiction to adjudicate all property disputes between the parties. To read the language as restricting the power of adjudication to only those property rights incident to the marriage would in many instances result in multiplicity of actions and perhaps extended litigation."

What that Court has said of property claims in divorce actions should be equally true of property claims in actions to enforce support of wife under the statute.

4. The Remaining Relief Sought.

The District Court had no jurisdiction to grant the remaining relief sought. Each remaining relief sought, namely, to stay the Municipal Court possessory action pending this action, to enjoin the sale of the real estate in question pending termination of this action, to subject the property to pay any award of support money, and for other relief, is equitable in nature. Section 11-763 (a), D. C. Code (1951) gives the Domestic Relations Branch of the Municipal Court such equitable power as may be necessary "to effectuate the purposes" of the statute giving it jurisdiction. It follows then that the Domestic Relations Branch has jurisdiction to grant these items of equitable relief. In any event, since they are in aid of or ancillary to the principal relief sought, namely, support for wife and minor child, the District Court must have no jurisdiction to grant these items of relief if it has no jurisdiction to grant the principal relief sought. 28 Am. Jur., Injunctions, Section 15 at pages 503-505.

B. SERVICE OF PROCESS WAS PROPERLY QUASHED.

The principal relief sought by appellant was support money for herself and minor child. Such actions are not proceedings in rem but are personal actions, or actions in personam. Bliss v. Bliss, 63 App. D. C. 237, 50 F. 2d 1002; Vertner v. Vertner, 63 App. D. C. 179, 70 F. 2d 783; Gaines v. Gaines, 81 U. S. App. D. C. 260, 157 F. 2d 521. In order to

obtain a personal judgment in such an action personal service within the jurisdiction of the Court must be had on the defendant. Indemnity Ins. Co. of North America v. Smoot, 80 U. S. App. D. C. 287, 152 F. 2d 667, 163 A.L.R. 498, cert. den. 328 U. S. 835, 66 S. Ct. 981, 90 L. Ed. 1611. A Judgment in certain actions in rem enumerated in Sec. 13-108 D. C. Code, (1951) may be secured upon substituted service by publication or extra-territorial personal service. An action for support or maintenance is not embraced in that section.

Our Courts have in actions otherwise in personam allowed judgments to be rendered upon substituted service of process against a non-resident defendant to the value of property of the defendant real or personal located within the jurisdiction and have subjected the property to the payment of the judgment, provided the property is seized at the outset by statutory attachment. These actions are often referred to as quasi in rem.

In Buchanan v. National Savings & Trust Co., 79 U. S. App. D. C. 278, 146 F. 2d 13, an ex-wife sued her non-resident husband for support and maintenance. The former husband was the beneficiary of a trust whose situs was in this jurisdiction. He was served by publication under Code Sec. 13-108. In affirming the quashing of service by the trial court this court stated at page 15 of its opinion:

"The District Court held correctly that appellant could not recover funds due as alimony to the wife or for the benefit of creditors. Such recovery would of necessity be based upon the theory of maintenance or contract or debt. While a spendthrift trust may under some circumstances be subjected to the obligation to support a wife or child, the enforcement of such an obligation would require either personal service on John Buchanan [the defendant] or an attachment of his equitable interest in the fund after the execution of a bond. [Citing D. C. Code (1940) Sec. 16-301; Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. ed. 565] (Emphasis supplied)

Section 16-301 of the Code referred to in the Buchanan case is still in effect in the District. It provides for attachment before judgment in actions against nonresidents and absentees for breach of contract or debt among others upon the filing of certain affidavits and the posting of a bond in double the amount of the property attached. (See Statutes Involved, pp. 1-3). The appellant here has failed to comply with this section and, therefore, has not secured jurisdiction to proceed quasi in rem.

In the case of King et al. v. Fay et al., 169 F. Supp. 934, Judge Tamm of our District Court held service of process was valid where a former wife who sued her former husband, a nonresident, for unpaid money under a property settlement, attached his vested reversionary interest in a local trust fund under Sec. 16-301 and served him by publication in accordance with Sec. 13-108. At page 938 of his opinion Judge Tamm stated:

"The action taken under Title 16, Section 301, District of Columbia Code has served to bring the property before the Court, and the manner of service as provided for by Title 13, Sec. 108, District of Columbia Code has been accomplished." (Emphasis supplied)

This persuasive opinion leaves the clear implication that if the attachment were not accomplished the property would not be before the Court.

Appellant cites two cases in support of her contention that nothing more than the specification of the premises involved is sufficient to give the Court quasi in rem jurisdiction. Pennington v. Fourth National Bank, 243 U. S. 269, 37 S. Ct. 282, 61 L. Ed. 713 and Thompson v. Tanner, 53 App. D. C. 3, 287 F. 980. Neither case is persuasive here. In the Pennington case the Supreme Court made it clear at page 283 of its opinion that it authorized equitable process "in order to reach and apply property which cannot be attached at law." (Emphasis supplied). The appellee's property can be attached in this case. In the Thompson case this Court was dealing with a specific statutory authority (Sec. 975 D. C. Code (1901), now Sec. 16-410 D. C. Code (1951)) which explicitly provided for sequestration

of a husband's local property upon his failure to pay alimony pendente lite during an action for divorce or to nullify a marriage. This section of the Code obviously has no pertinence to the instant case which seeks no divorce nor nullification of marriage.

Since the remaining relief requested is conceded by appellant to be incidental to the principal relief (appellant's brief, p. 6), service of process as to the remaining relief sought should fall with that for the principal relief. There is, however, the additional ground that injunctions or other equitable actions are in personam actions and no personal service was obtained here. Indemnity Ins. Co. of North America v. Smoot, supra.

C. ASSUMING THE LOWER COURT HAD NO JURISDICTION,
THE CASE SHOULD NOT BE CERTIFIED TO THE MUNICI-
PAL COURT.

Appellant suggests in her conclusion at page 10 of her brief that if the District Court has no jurisdiction over the subject matter of the action that the case should be certified to the Municipal Court as was done in Harris v. Harris, 106 U. S. App. D. C. 283, 272 F. 2d 511.

Appellee submits that, if the District Court had no jurisdiction this Court should merely affirm the judgment and not remand the case for certification to the Municipal Court because there is no statutory authority for such certification. Sec. 11-765 D. C. Code (1951) provides in pertinent part:

(a) "If, in any action, other than an action for equitable relief, pending on the effective date of this section or thereafter commenced in the United States District Court for the District of Columbia, it shall appear to the satisfaction of the court at any time prior to trial thereof that the action will not justify a judgment in excess of \$3,000, the court may certify such action to the municipal court for the District of Columbia for trial . . ."

From a reading of the statute it is clear that no action seeking equitable relief may be certified. The instant action seeks equitable relief and therefore may not be certified under the statute at least to the extent equitable relief is sought.

It would also appear that Sec. 11-756 contemplates a certification only of cases wherein the District Court has jurisdiction over the subject matter of the action but wherein the District Judge in his discretion feels the jurisdictional amount of more than \$3,000.00 has not been met. The statute uses the permissive language "may certify". If the statute contemplated certification of cases by the District Court where that Court has no jurisdiction over the subject matter the permissive certification would have little meaning.

Appellee knows of no other statutory authority for certification as suggested by appellant.

CONCLUSION

The District Court lacked jurisdiction over the subject matter of appellant's action. Jurisdiction thereof is solely in the Domestic Relations Branch of the Municipal Court. Therefore, the complaint was properly dismissed. Assuming, however, jurisdiction in the District Court, service of process was properly quashed because neither the appellee nor his property was brought before the Court. Therefore the judgment should be affirmed. Moreover, this court should not remand the case to the District Court to be certified to the Municipal Court since there is no statutory authority for such certification.

Respectfully submitted,

JOHN J. PYNE

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Attorney for Appellee.

Of Counsel:

FROST & TOWERS

